not fulfill Verizon's obligation to re-file tariffs for all payphone services where the existing rates did not meet the new services test, *i.e.*; for the PAL and usage services. Petitioners contend that Verizon failed to either certify correctly that its existing tariffs complied with that test or to file new tariffs which did comply, as required by the Order. Therefore, petitioners argue that Verizon is still not in compliance with the FCC Order and remains liable for refunds until the PSC properly approves rates which comply with the new services test.

In addition, petitioners contend that, although Verizon's pre-existing rates are not subject to refund under the provisions of the Public Service Law, they may be subject to refund pursuant to a valid regulatory Order, such as the FCC Order dated April 15, 1997, rendering the filed tariff doctrine inapplicable. Petitioners argue that, even if the filed tariff doctrine were available to Verizon, Verizon waived its right to invoke that doctrine in the April 10, 1997 letter from the RBOC to the FCC.

Based upon the foregoing, petitioners request that this matter be remanded to the PSC and that the PSC be directed to conduct a proceeding to establish new rates for Verizon's underlying pay telephone lines, usage, functions and features, in accordance with the new services test as specified in the Wisconsin Order and as further modified by the January Order, and that this proceeding be staying pending completion of those proceedings.

ANALYSIS, FINDINGS & CONCLUSIONS

Initially, the Court notes that the fact that Verizon did not submit new PAL and/or usage rates subsequent to the enactment of the Telecommunications Act of 1996 does not preclude petitioners from challenging those rates for failure to comply with the Act, since the Act required Verizon to file revised tariffs in the event that its existing rates were not in compliance.

This Court further notes that state courts have consistently afforded the PSC wide discretion in exercising its statutory powers, including its authority over rate structure matters (see Matter of MCI Telecom. Corp. v Public Serv. Commn. 231 AD2d 284; Multiple Intervenors v Public Serv. Commn., 154 AD2d 76). In exercising its statutory responsibilities to ensure just and reasonable rates, "the PSC has broad authority with respect to the factors to be considered and formula or formulae to be used, subject only to the limitation that there must be a rational basis and reasonable support in the record for the judgment exercised" (Matter of Rochester Tel. Corp. v Public Serv. Commn. of the State of NY, 87 NY2d 17, 29; New York Tel. Co. v Public Serv. Commn., 95 NY2d 40; Matter of Niagara Mohawk Power Corp. v Public Serv. Commn. 69 NY2d 365, 369; Matter of Abrams v Public Serv. Commn, 67 NY2d 205, 212-218; Matter of New York State Council of Retail Merchants v Public Serv. Commn., 45 NY2d 661, 672).

Nevertheless, the Court also recognizes that, where the FCC has established standards and criteria to be followed by the states, the PSC must apply them. There seems to be no dispute that the PSC was required to apply federal law in reviewing Verizon's PAL rates subsequent to the enactment of the Telecommunications Act of 1996. The issue before this Court is whether the PSC's determination that Verizon's PAL rates complied with the new services test established by that Act was rational and had reasonable support in the record, based on the law existing at the applicable time. In order to resolve that issue, the Court must first answer the question of whether the applicable time is when the tariffs were filed by Verizon or when the PSC rendered its determinations that the rates were in compliance with federal law and must then ascertain what the law was at those times.

Regarding the first question, this Court concludes that the applicable date for determining the controlling law in this matter must be December 31, 1996 - the date on which Verizon filed its tariffs, continuing its pre-existing PAL rates and proposing new tariffs not relevant herein, effective April 15, 1997. To conclude otherwise, would be to impermissibly allow ratemaking on a retrospective, rather than a prospective, basis (see Niagara Mohawk Power Corp. v Public Serv. Commn., 54 AD2d 255).

Having reached that conclusion, it inevitably follows that neither the Wisconsin Order nor the January Order are applicable to this proceeding.[2] Thus, this Court is further constrained to conclude that petitioners have failed to exhaust their administrative remedies with regard thereto. Although IPANY did raise the issue of the Wisconsin Order in its reply comments to the PSC in connection with its petition filed in December 1999, the Order was raised in support of the position that the rates filed by Verizon in 1996 were improper. Thus, IPANY was attempting to use the Wisconsin Order retroactively. This Court is unaware of any petition having been filed by petitioners to modify Verizon's rates prospectively based on either the Wisconsin Order or the January Order.

This Court is also unpersuaded by petitioners' contention that those Orders merely clarified the application of the new services test, and did not add anything new. Even if that were true, this Court cannot attribute to the PSC at the time of the subject tariff filings information

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[2]This Court agrees with petitioners' interpretation that the CCB's explanation of the law set forth in the Wisconsin Order was not limited in its application to the four named Wisconsin LECs, and notes that the language of that Order providing that it applied to the four LECs referred only to the CCB's requirement that those four companies submit certain data. Thus, it is the opinion of this Court that the provisions of that Order would have been binding on the PSC in this matter had it been in effect when the subject rates were filed by Verizon. However, the fact that this Court has reached a different conclusion than the PSC regarding the binding effect of the Wisconsin Order would not necessarily render the PSC's conclusion irrational.

obtained in hindsight to the extent that information was not clearly available prior to the Wisconsin and January Orders (particularly since the January Order ultimately modified the Wisconsin Order). In addition, this Court does not have the authority in the context of an Article 78 proceeding to direct Verizon to file new rates which are in compliance with those Orders. On the other hand, this Court may utilize those Orders to aid in its understanding of what the CCB and the FCC believed was and was not clear regarding the new services test under pronouncements made prior to the filing of the subject tariffs.

The law in effect at the time the instant rates were filed included the Telecommunications Act of 1996, itself, the FCC regulations interpreting the Act, the Payphone Orders and miscellaneous other FCC directives. The Court must determine whether the provisions thereof clearly: required the use of a forward-looking cost methodology to determine the subject PAL rates; required the subtraction of EUCL charges; precluded use of the same overheads used to calculate normal business line rates; and/or mandated application of the new services test to usage services, so as to render any contrary determination by the PSC irrational.

Under the First Payphone Order, 11 FCCR at 20611, para.142, the FCC made it clear that LECs were required to "unbundle payphone line services and file tariffs with the Commission for such services using the price cap 'new services' test" (In the Matter of Wisconsin Public Service Commission Order Directing Filings (FCC 02-25, rel. Jan. 31, 2002). All parties to the instant proceeding appear to acknowledge that the new services test was understood at the time of Verizon's tariff filing to require that the proposed rates recover no more than "the direct costs of the service plus 'a just and reasonable portion of the carrier's overhead costs'" (In the Matter of Wisconsin Public Service Commission Order Directing Filings, (FCC 02-25, rel. Jan. 31, 2002,

citing 47 CFR §61.49[f][2]) and that costs were required to be calculated by the use of "an appropriate forward-looking, economic cost methodology that is consistent with the principles the Commission set forth in the Local Competition First Report and Order" (In the Matter of Wisconsin Public Service Commission Order Directing Filings, (FCC 02-25, rel. Jan. 31, 2002 [citation omitted]). In fact, in the January Order, the FCC noted that its "longstanding precedent shows that we have used forward-looking cost methodologies where we have applied the new services test" (citations omitted). The dispute in this case involves whether Verizon's rates, which were in existence prior to the 1996 Act and which were continued thereafter, complied with those requirements.

The PSC determination dated October 12, 2000 explicitly stated that Verizon's rates were based on "embedded cost plus a reasonable contribution toward common costs and overhead". Since embedded costs are historical or non-forward looking costs (see, generally, MCI Communications Corp. v ATT, 708 F2d 1081, 116-1117 [embedded costs are historical costs]), they would not necessarily comply with the new services test. Although the PSC now asserts that it considered forward-looking cost data and that Verizon's rates were based on such data, it cannot assert for the first time in this proceeding a different ground for its determination than what it expressed in its initial determination (see Matter of Central NY Coach Lines, Inc., supra, at 152).

With regard to Verizon's overhead charges, failure to subtract EUCL charges and failure to apply the new services test to usage services, it is apparent from a reading of the January Order that confusion and inconsistent interpretations of the law among the state public service commissions had been widespread; hence the need for that Order. Given the procedural history

set forth in the January Order, which indicates that these issues were not clearly and specifically addressed by the FCC until after Verizon's tariff filings in 1996[3], and the flexibility intended by the FCC, this Court cannot conclude that the PSC's determinations regarding same were irrational.

Regarding the issue of petitioners' entitlement to refunds, the Court notes that the letter dated April 10, 1997 from Michael K. Kellogg to the CCB on behalf of the RBOC Payphone Coalition indicates that the Coalition did not previously understand that existing, already-tariffed payphone services were required to meet the new services test. Therefore, the LECs requested that the FCC waive the requirement that effective intrastate payphone tariffs meet the new services test, subject to three conditions: (1) that they make a written filing with the FCC by April 15, 1997, attempting to identify any potentially non-compliant state tariff rates; (2) that they file a new state tariff rate within 45 days of the April 4, 1997 FCC Order if the existing rate did not comply with the new services test; and (3) in the event a new tariff rate is filed "to comply with the 'new services' test pursuant to this waiver and the new tariff rate is lower than the previous tariff rate as a result of applying the 'new services' test, the LEC will provide a credit or other compensation to purchasers back to April 15, 1997".

In response to that letter, the FCC issued an Order on April 15, 1997, granting all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test. Pursuant to the Order, "[a] LEC who seeks to rely on the waiver...must

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[3]For example, even petitioners acknowledge in their papers that it was not until October 5, 1999 that the FCC confirmed, in a letter from the Deputy Chief of the CCB, that usage was covered by the new services test.

reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates" (In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, DA 97-805, rel. Apr. 15, 1997).

By letter dated May 19, 1997 from Robert P. Slevin to the PSC on behalf of Verizon's predecessor, New York Telephone (hereinafter Verizon), Verizon advised the PSC that "[o]nce the FCC clarified that the new services test does indeed apply to new and existing payphone services, the company examined its state tariff rates in light of the recent FCC clarification in order to assure its compliance...The Company's intrastate payphone tariffs are in compliance with federal requirements, except as otherwise noted".

This Court finds that the foregoing documents establish that Verizon learned, after filing its revised tariffs on December 31, 1996, that it was also required to review its existing tariffs to determine if they were in compliance with the new services test. The Court further finds that the terms of the April 10, 1997 letter and the April 15, 1997 Order did not require that Verizon actually revise its tariffs in order to subject it to the requirement of issuing refunds or credits, but that Verizon was required to issue refunds or credits if it was eventually determined that it should have reduced its tariffs. In addition, the letter dated May 19, 1997 demonstrates that Verizon did take advantage of the FCC's limited waiver by taking additional time to review its existing rates, despite the fact that it did not ultimately change its previously-filed tariffs. Moreover, the general rules prohibiting retroactive rate changes do not apply where, as here, there is an Order directing such refunds, made at the request of the LECs, including Verizon, in exchange for other benefits received by them. Accordingly, if the PSC erroneously concluded that Verizon's PAL

rates complied with the new services test and if it is determined hereafter that new tariffs should have been filed which would have been lower than the existing rates, then petitioners would be entitled to a refund or credit.

In sum, it is not clear whether the PSC properly issued its Orders based upon the laws and regulations in effect at the time of its decisions. More specifically, although the pre-existing PAL rates may have been based on forward-looking costs, the PSC's determination indicated that they were based on embedded costs, which do not necessarily comply with the new services test. Accordingly, this matter is remanded to the PSC for further proceedings to determine whether the rates comply with this aspect of the new services test and, if not, to determine what, if any, refunds are required pursuant to the FCC Order dated April 15, 1997. The Petition is denied in all other respects.

This memorandum constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to the attorneys for petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

SO ORDERED!

ENTER.

Dated: July 31, 2002
Albany, New York

Leslie E. Stein, J.S.C.

Papers Considered:

1. Notice of Petition dated January 18, 2002;
2. Verified Petition dated January 18, 2002 with exhibits annexed;
3. Petitioner's Memorandum of Law dated January 18, 2002 with exhibits annexed;
4. Petitioner's Supplemental Memorandum of Law dated February 25, 2002 with exhibits annexed;

5. Verified Answer of Respondent, Verizon New York, Inc. dated March 8, 2002;
6. Memorandum of Law of Respondent Verizon New York, Inc. dated March 8, 2002 with exhibits annexed;
7. Verified Answer of Respondent Public Service Commission dated March 8, 2002 with exhibits annexed;
8. Memorandum of Law of Respondent Public Service Commission dated March 8, 2002;
9. Petitioner's Reply Memorandum of Law dated March 14, 2002;

EXHIBIT H

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of

INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC. and TELEPLEX COIN COMMUNICATIONS, INC.,

Petitioners,

-against-

DECISION AND ORDER
Index No. 413-02
RJI No. 01-02-ST2369

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND VERIZON NEW YORK, INC.,

Respondents.

APPEARANCES:

ROLAND, FOGEL, KOBLENZ & PETROCCIONE, LLP
Attorneys for Petitioners
(Keith J. Roland, Esq. of Counsel)
One Columbia Place
Albany, New York 12207

SANDRA DILORIO THORN, ESQ.
THOMAS J. FARRELLY, ESQ.
Attorneys for Respondent Verizon New York, Inc.
1095 Avenue of the Americas, Room 3745
New York, New York 10036

LAWRENCE G. MALONE, ESQ.
(Michelle L. Phillips, Esq. of Counsel)
Attorneys for Respondent Public Service Commission of the State of New York
Three Empire State Plaza
Albany, New York 12223

Leslie E. Stein, J.

Petitioners commenced the instant Article 78 proceeding requesting that the Court set aside two determinations issued by the Public Service Commission (PSC) on October 12, 2000 and September 21, 2001, respectively. The basis of the petition was that certain rates charged by Verizon to petitioners were not consistent with the Federal Communications Commission's "new services test". By Decision and Order dated July 31, 2002, this Court concluded that: the applicable date for determining the controlling law in this matter was December 31, 1996, the date on which Verizon filed the tariffs which are the subject of this proceeding; neither the Decision of the Common Carrier Bureau (CCB) of the Federal Communications Commission (FCC) dated March 1, 2000 (hereinafter the "Wisconsin Order") or the Decision of the full FCC dated January 31, 2002 (hereinafter the "January Order"), which modified the Wisconsin Order, were applicable to the PSC's determination; that the PSC's determinations concerning Verizon's failure to subtract Federal End User Common Line Charges (EUCLs) in arriving at its overhead charges and concerning Verizon's failure to apply the new services test to usage charges were not irrational; that the PSC's determination approving Verizon's rates did not indicate that the rates were based upon forward-looking costs; and that petitioners would be entitled to a refund or credit if the PSC erroneously concluded that Verizon's public access line (PAL) rates complied with the new services test and if it was subsequently determined that new tariffs should have been filed which would have been lower than the existing rates. Accordingly, the Court remanded the matter to the PSC for further proceedings to determine whether Verizon's PAL rates were based on forward-looking costs in accordance with the new services test, based upon the laws and regulations in effect at the time of the PSC decisions approving such rates.

Petitioners now move for "clarification, reargument or renewal, and/or modification" of the aforesaid Decision and Order. Petitioners request more specificity as to the standards to be applied by the PSC on remand. In particular, petitioners seek an Order specifying that, on remand, the PSC must: apply the holdings of the Wisconsin Order and January Order in determining whether the rates existing prior to December 31, 1996 were lawful as of April 15, 1997; preclude imposition of, or otherwise give credit for, the Federal End User Common Line Charge (EUCL); apply the new services test methodology to usage rates, as well as fixed, monthly PAL and feature rates; and determine the lawfulness of the subject rates as of April 15, 1997, with refunds to be awarded as of that date.

Respondents oppose petitioners' motion and Verizon cross-moves for reargument of that portion of this Court's previous Decision that determined that certain rates charged by Verizon were subject to refund.

Pursuant to CPLR 2221(a), a motion for leave to renew or to reargue a prior motion or to modify an Order must be made to the Judge who signed the Order. A motion made to the wrong Judge must be transferred to the proper Judge (see CPLR 2211[c]). Since petitioners' motion herein has been submitted to the Judge who signed the original Order, respondents' opposition based upon petitioners' alleged failure to do so is without merit.

Respondents argue that petitioners' motion fails to offer any new factual information or to demonstrate that there has been a change in the law. Respondents further argue that petitioners have not separately identified and supported each item of relief sought, as required by CPLR 2221(f) in a combined motion for leave to reargue and to renew. Respondents contend that this Court should treat petitioners' motion as one for leave to reargue and that the motion should be

denied because petitioners have merely re-stated the same arguments which were previously considered and rejected by the Court and have failed to demonstrate a material error of law or fact.

To the extent that petitioners have even attempted to raise any new matters of fact, such facts will not be considered by this Court because petitioners have not provided any justification for the failure to present such facts on the prior motion (see CPLR 2219[d][2]; CPLR 2219 [e][3]). However, petitioners may properly argue that this Court overlooked or misapprehended matters of fact or law in determining the prior motion (see CPLR 2219[d][2]) or "that there has been a change in the law that would change the prior determination" (CPLR 2219[e][2]).

In some respects, petitioners' motion is merely repetitive of arguments previously made and considered by this Court. However, petitioners also raise some new arguments and point to facts which they assert the Court may have overlooked.

First, petitioners argue that the appropriate date for determining the controlling law in this matter should be April 15, 1997, since that was the date Verizon was required by the FCC to modify its pre-existing tariffs to comply with the new services test. Verizon disputes petitioners' contention that it was obligated to have tariffs that complied with the new services test by that date, as the April 15, 1997 FCC Order extended their time to May 19, 1997. However, Verizon agrees, for different reasons, that April 15, 1997 is the date at which the controlling law should be determined.

Although the Court is not completely convinced by the parties' arguments, there appears to be little, if any, practical effect to this requested change to the Court's prior Decision and the parties are in agreement concerning the controlling date. Therefore, petitioners' request in this regard is granted.

Petitioners cite the case of Michigan Pay Telephone Assn. v Michigan Public Serv. Commn., *et al.*, 646 NW2d 471, decided on June 24, 2002, as new law supporting their contention that the PSC should be required to consider the Wisconsin Order, as modified by the January Order, on remand. However, although the Michigan Supreme Court remanded that matter to the Michigan PSC "for reconsideration in light of [the January Order]", it did not direct the PSC to apply any particular provisions of that Order, nor is that Decision binding on this Court. In addition, the facts of the Ninth Circuit Court of Appeals' determination in US West Communications, Inc. v Jennings, et al., 304 F3d 950, are distinguishable, as it addressed agreements concerning price determinations to be applied prospectively.

The remainder of petitioners' arguments concerning the effect of the Wisconsin Order and January Order with respect to this matter add nothing new to the arguments made in connection with the original petition. Upon reconsideration, petitioners have failed to convince this Court that it overlooked or misapprehended any fact or law with respect to this issue so as to warrant a different result.

With respect to treatment of the EUCL charge and applicability of the new services test to usage charges, the Court previously considered the parties' arguments and concluded as follows:

> With regard to Verizon's overhead charges, failure to subtract EUCL charges and failure to apply the new services test to usage services, it is apparent from a reading of the January Order that confusion and inconsistent interpretations of the law among the state public service commissions had been widespread; hence the need for that Order. Given the procedural history set forth in the January Order, which indicates that these issues were not clearly and specifically addressed by the FCC until after Verizon's tariff filings in 1996, and the flexibility intended by the FCC, this Court cannot conclude that the PSC's determinations regarding same were irrational (footnote omitted).

Even if the appropriate date for determining controlling law is changed to April 15, 1997, petitioners have failed to show that this Court overlooked or misapprehended any matters of fact or law in reaching this conclusion.

In further opposition to petitioners' motion and in support of its own motion, Verizon asserts that this Court misapprehended the April 15, 1997 Order of the FCC and that said Order does not provide a basis for any refunds to petitioners in relation to pre-existing "permanent" rates. Verizon argues that the language of the letter from the RBOC Coalition letter which resulted in the April 15, 1997 Order "makes clear that the commitment to make certain rates subject to potential refund was limited to rates that would be changed by tariff filings made by the members of the Coalition during the 45-day extension of time given to them to file new tariffs in order to comply with the new services test". Verizon also asserts that the letter indicates that "there may be instances in which the review of existing rates, that would be completed during the 45-day period, may reveal a 'discrepancy' between an existing rate and the rate that would be required to satisfy the new services test. In such a case, 'new tariff rates may have to be filed'". Verizon contends that the language of the letter proposing refunds "'once the new state tariffs' become effective, if 'the new tariff rates are lower than the existing ones'" demonstrates that the commitment to make refunds was limited to rates that were changed during the 45-day period from April 4, 1997 - May 19, 1997.

Similarly, Verizon contends that the refund provided by the April 15, 1997 Order was limited to tariffs that were changed during that period. For example, Verizon points to that portion of the Order stating that "the Coalition and Ameritech have committed, **once the new intrastate tariffs are effective**, to reimburse or provide a credit to its customers for these payphone services from April 15, 1997, if **newly tariffed rates, when effective** are lower than

existing rates" (emphasis added). In sum, Verizon argues that the refund requirement only applied to tariff revisions that were actually filed during the 45-day waiver period and was not intended to apply to existing rates which Verizon did not intend to change. It is Verizon's position that, while the existing rates were not insulated from future challenges, including allegations of failure to meet the new services test, the April 15, 1997 Order did not intend to subject those rates to refund.

The interpretation urged by Verizon would have the result that, so long as Verizon properly identified those pre-existing rates which required modification in order to comply with the new services test and made such modification by May 19, 1997, purchasers would be entitled to refunds to the extent that the modified rates were lower than the pre-existing rates. However, in the event that Verizon did not properly identify those pre-existing rates which required modification - intentionally or unintentionally - no refunds would be due even if the PSC (or the Court) ultimately determined that the pre-existing rates failed to comply with the new services test and, therefore, **should have been** modified by May 19, 1997. Stated otherwise, Verizon would be rewarded for failing to properly identify those pre-existing rates which did not comply with federal law. This interpretation is illogical. Furthermore, the language pointed to by Verizon actually supports the interpretation adopted by this Court that refunds would be due at such time as new tariffs in compliance with the new services test actually took effect.

Verizon argues that, even if it is assumed that the Order was intended to provide for refunds of rates that were not changed during the waiver period, the relief provided by the April 15, 1997 Order was only applicable for a very limited period of time. For example, the Order provides that it was "granting a limited waiver of brief duration" and that "the states must act on

the tariffs filed pursuant to this Order within a reasonable period of time". However, this language merely applies to the limited time that Verizon was given to file revised tariffs to comply with the new services test and to the time given to the states to act on the tariffs filed, not to the period for which refunds might be given. In addition, petitioners should not be penalized by failure of the state to act in a timely manner if, in fact, there was undue delay in the review process.

Verizon further argues that petitioners are not entitled to refunds due to their failure to raise the issue of refunds with the PSC until it filed a petition with the PSC on December 2, 1999. Verizon also argues that petitioners did not make any claims regarding the application of the new services test to usage charges until that date and never requested refunds of such charges. Verizon contends that, since the latter issue was not raised before the PSC, it may not be raised in this proceeding.

In addition, Verizon appears to argue that this Court's previous Decision and Order does not require it to issue refunds, even if it is shown that the existing rates do not comply with the forward-looking costs requirement of the new services test. While this Court does not agree with petitioners' contention that the Decision and Order requires the PSC to use the difference between the existing rates and the rates that would be determined by applying the holdings of the Wisconsin and January Orders in calculating any refunds which may be due, the Decision and Order does require the PSC to calculate the difference between the existing rates and the rates that would be determined by applying the new services test as it existed as of the applicable date (determined herein to be April 15, 1997) and to grant refunds if the latter is lower than the former.

Finally, Verizon asserts that petitioners are not entitled to interest on any refunds since the petition did not request interest and such new matter cannot be raised for the first time in a motion for reargument. A motion for reargument is not an opportunity for a party to raise an issue not previously raised (see Mehta v Mehta, 196 AD2d 841; CPLR 2221[d][2]). Petitioners clearly failed to raise the issue of entitlement to pre-judgment interest in their petition and, therefore, are precluded from now raising the issue in their reargument motion.

This memorandum constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to the attorneys for petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

SO ORDERED!

ENTER.

Dated: April 22, 2003
Albany, New York

Leslie E. Stein, J.S.C.

Papers Considered:

1. Petitioners' Notice of Motion dated August 28, 2002;
2. Affidavit of Keith J. Roland, Esq., dated August 28, 2002, together with all annexed exhibits;
3. Respondent Verizon's Notice of Cross-Motion dated September 2002;
4. Affidavit in Support of Respondent's Cross-Motion of Thomas J. Farrelly, Esq., dated September 27, 2002, together with all annexed exhibits;
5. Affidavit in Opposition of Thomas J. Farrelly, Esq., dated September 26, 2002, together with all annexed exhibits;
6. Affidavit in Opposition of Michelle L. Phillips, Esq. together with all annexed exhibits dated September 26, 2002;

7. Respondent PSC's Brief in Opposition dated September 26, 2002;
8. Petitioners' Reply Brief dated October 16, 2002, together with all annexed exhibits;
9. Petitioners' Affidavit in Opposition to Respondent Verizon's cross-motion, dated October 24, 2002, together with all annexed exhibits;
10. Respondent Verizon's Reply Memorandum of Law dated November 6, 2002;
11. Respondent PSC's Sur-reply Brief dated November 6, 2002;
12. Respondent Verizon's Sur-reply Brief dated November 6, 2002.

EXHIBIT I

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 25, 2004 93539

In the Matter of INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC., et al.,
Appellants-Respondents,

v

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

and

VERIZON NEW YORK, INC.,
Respondent-Appellant.

MEMORANDUM AND ORDER

Calendar Date: October 15, 2003

Before: Cardona, P.J., Crew III, Carpinello, Rose and Lahtinen, JJ.

Roland, Fogel, Koblenz & Petroccione L.L.P., Albany (Keith J. Roland of counsel), for appellants-respondents.

Dawn Jablonsky Ryman, Public Service Commission, Albany (Michelle L. Phillips of counsel), for respondent.

Thomas J. Farrelly, Verizon New York, Inc., New York City, for respondent-appellant.

Crew III, J.

Cross appeals (1) from certain parts of a judgment of the Supreme Court (Stein, J.), entered July 31, 2002 in Albany

County, which, inter alia, partially denied petitioner's application, in a proceeding pursuant to CPLR article 78, to set aside two determinations of respondent Public Service Commission approving permanent rates of respondent Verizon New York, Inc., and (2) from certain parts of an order of said court, entered May 1, 2003 in Albany County, which, upon reconsideration, inter alia, modified the applicable date for determining controlling law.

In 1996, Congress amended the Telecommunications Act (47 USC § 276) (hereinafter the Act) in an effort to deregulate pay phone service rates in order to promote free market competition in the pay phone industry. At the time of the enactment, pay phone services in the state were provided to the public by independent pay phone service providers (hereinafter PSPs), such as petitioner Teleplex Coin Communications, Inc., and local exchange carriers (hereinafter LECs), such as respondent Verizon New York, Inc. In order to offer pay phone service to the public, PSPs utilized LEC lines at rates established by the LECs and approved by respondent Public Service Commission (hereinafter PSC). The Act required that LEC line rates be cost-based, nondiscriminatory and compliant with the "new services" test that was promulgated to implement the Act (see 47 USC § 276; 47 CFR 61.49 [g], [h]). That test permits an LEC to recover its direct cost plus a reasonable amount of overhead in providing its access lines to PSPs.

The PSC thereafter directed LECs to file tariff rates by January 15, 1997 to become effective April 15, 1997. Accordingly, Verizon's predecessor filed new rates for its so-called "smart" lines, but left unchanged its rates for the preexisting "dumb" lines used by the PSPs to provide pay phone service to the public. Those rates were approved on a temporary basis.

Thereafter, the PSC invited comments on the tariffs submitted to it by the LECs. Petitioner Independent Payphone Association of New York, Inc., a trade association that represents owners and operators of independent public pay phones, and Teleplex registered a number of objections to Verizon's tariffs. When the PSC took no action in response to those

objections, petitioners petitioned the PSC requesting that Verizon's tariffs be declared unlawful. That petition was denied. When petitioners' request for rehearing was likewise denied, petitioners commenced the instant proceeding pursuant to CPLR article 78 seeking to set aside the PSC's orders.

Supreme Court found, and the record reflects, that Verizon's tariff filing in December 1996 complied with the new services test regarding its new smart lines, but left in place the preexisting rates for the "dumb" payphone lines used by petitioners. Inasmuch as those rates were based upon "embedded" or historical costs, and not the forward-looking economic costs envisioned in the new services test, Supreme Court remanded the matter to the PSC for determination of whether the preexisting tariffs complied with the new services test. Supreme Court further held that in the event that the preexisting rates were found not to be compliant and the new compliant rates proved to be lower than the preexisting rates, petitioners would be entitled to a refund or credit. Supreme Court denied the petition in all other respects. Petitioners appeal from certain portions of Supreme Court's judgment, and Verizon appeals from that portion of Supreme Court's judgment as determined that Verizon's tariffs were subject to a potential refund. Petitioners and Verizon also cross-appeal from Supreme Court's order, which, upon reconsideration, modified the applicable date for determining the controlling law.

During its initial review of Verizon's tariffs, the PSC refused to consider a March 2, 2000 order of the Common Carrier Bureau of the Federal Communications Commission relating to the implementation of the Act in Wisconsin (hereinafter the Wisconsin order), which enunciated certain rules or guidelines that LECs must follow in establishing rates for services needed by PSPs. Petitioners claim that Supreme Court was in error in that regard. We disagree.

It is axiomatic that an agency's determination should not be disturbed absent a finding that the determination has no rational basis or is without any reasonable support in the record (see e.g. Matter of Owner's Comm. on Elec. Rates v Public Serv. Commn. of State of N.Y., 194 AD2d 77, 80 [1993]). The Wisconsin

order specifically provided that "this Order only applies to the LECs in Wisconsin specifically identified herein." Given that, it is difficult to discern how the PSC's determination that the terms of the Wisconsin order were not applicable to its considerations was irrational.

Next, petitioners contend that Supreme Court erred when it ruled that the PSC need not consider, on remand, the Wisconsin order and a further order issued January 31, 2002, which essentially affirmed the Wisconsin order but further explicated on the manner in which the new services tests must be applied. That order acknowledged the widespread confusion and inconsistent interpretations among the various state public service commissions regarding the implementation of the new services test.

Initially, we note that Supreme Court quite properly concluded that petitioners could have petitioned the PSC to change Verizon's rates in response to the Wisconsin order.[1] They did not do so and, as such, they failed to exhaust their administrative remedies (see generally Young Men's Christian Assn. v Rochester Pure Water Dist., 37 NY2d 371, 375 [1975]). Moreover, at the time the PSC was considering Verizon's rates, the Wisconsin order was on appeal to the Federal Communication Commission and its terms were automatically stayed (see 47 USC § 155 [c] [3], [4]; 47 CFR 1.102 [a] [3]). Accordingly, the order could not be and properly was not considered by the PSC. Finally, the January 2002 order, while affirming much of the Wisconsin order, rejected a number of its premises and, thus, became the only order upon which petitioners may now rely. The issue then distills to whether the PSC should consider the January 2002 order upon remand. We think not.

It is axiomatic that rules promulgated by federal agencies may not be applied retroactively without the express permission

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[1] Indeed, we are advised that, in March 2003, Independent Payphone filed a petition with the PSC requesting reconsideration of Verizon's rates and Verizon has submitted proposed rates and supporting studies, which currently are under review by the PSC.

of Congress (see e.g. Bowen v Georgetown Univ. Hosp., 488 US 204, 208 [1988]). However, it is equally clear that retroactive application is not implicated where an order or ruling is merely interpretive (see e.g. Wisconsin Bell v Bie, 216 F Supp 2d 873, 878 [2002]). While the January 2002 order may be seen as interpretive in some respects, the provisions thereof providing that the new services test applies to usage services and that LECs must provide for a reduction or credit for the end user common line charge constitute new and substantive changes or additions to the interpretations of the new services test that existed at the time that the Wisconsin order was being reviewed. In short, the January 2002 order imposes mandatory rules to be employed by state public service commissions when approving tariffs that must be compliant with the new services test and, as such, it is not merely interpretive (see Pickens v United States Bd. of Parole, 507 F2d 1107, 1113 [1974]).

We differ with Supreme Court, however, with regard to its conclusion that petitioners will be entitled to a refund or credit in the event that the PSC concludes that new rates be established in accordance with the new services test and such rates prove to be lower than those presently in existence. The basis for Supreme Court's conclusion was a letter from representatives of Verizon's predecessor requesting an extension of time in which to review existing rates and file new rates if it were determined that the existing rates were not compliant with the new services test, proposing an agreement to refund or provide a credit to PSPs for the difference if the newly filed rates were lower than existing rates and requesting an order of the Federal Communications Commission granting a 45-day extension for filing new rates and ordering a refund in the event such new rates were indeed lower than existing rates. Suffice to say that new rates were not filed and the refund order was thus never effective. The fact that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration cannot be the basis of potential refunds that were only agreed to and contemplated for a period ending May 19, 1997.

Cardona, P.J., Carpinello, Rose and Lahtinen, JJ., concur.

ORDERED that the judgment and order are modified, on the law, without costs, by reversing so much thereof as directed respondent Public Service Commission to determine whether respondent Verizon New York, Inc. owed petitioners a refund; request for said refund denied; and, as so modified, affirmed.

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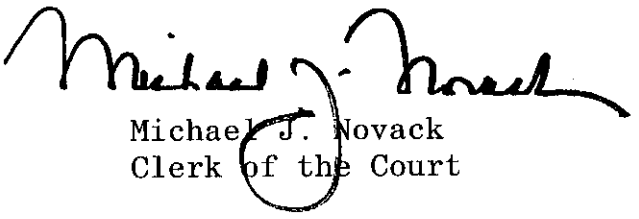

Michael J. Novack
Clerk of the Court